K. M. asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Eblen's determination that the International Alliance of Theatrical Stage Employees, Local No. 99, (referred to as "IATSE" hereafter) did not discriminate against Mr. M. in violation of the Utah Antidiscrimination Act, Title 34A, Chapter 5, Utah Code Annotated.

The Appeals Board exercises jurisdiction in this matter pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-5-107(11).

BACKGROUND AND ISSUES PRESENTED

On February 26, 2002, Kelly M. filed an amended complaint of discrimination with the Commission's Antidiscrimination and Labor Division ("UALD") alleging that IATSE had discriminated against him on the basis of disability and had retaliated against him for seeking accommodation of his disability, all in violation of the Utah Antidiscrimination Act. UALD investigated Mr. M.'S complaint and found cause to believe that IATSE had engaged in the alleged discrimination and retaliation.

IATSE challenged UALD's determination by requesting a *de novo* evidentiary hearing before an administrative law judge. Judge Eblen held the hearing on April 28, 2003, and then on September 9, 2003, ruled that IATSE had not unlawfully discriminated or retaliated against Mr. M..

Mr. M. now asks the Appeals Board to review Judge Eblen's decision. Although Mr. M. has identified several issues for review, the Appeals Board concludes that two issues are determinative: 1) Did Mr. M. suffer from a "disability," and 2) Did IATSE retaliate against Mr. M. because he sought accommodation for his disability.

FINDINGS OF FACT

The Appeals Board finds the following facts to be relevant to the issues raised in Mr. M.'S motion for review. The Appeals Board also adopts Judge Eblen's findings of fact to the extent they are consistent with these findings.

IATSE is a labor union representing theatrical workers. It also maintains a "hiring hall" through which theatrical workers are referred for work on various stage performances. The hiring hall is not limited to IATSE members; for a monthly fee non-members, known as "permittees," can also participate. Since 1995, Mr. M. has obtained stagehand work as an IATSE permittee.

When stagehands are hired for a production, they are expected to work through the entire run of the show. This includes unpacking and setting up equipment, operating the equipment during the show, and then disassembling and repacking the equipment at the end. This work can involve heavy lifting, sometimes in awkward positions.

During June 1997 Mr. M. was involved in a motorcycle accident and injured his left

shoulder. In late August 1997, his physician released him for work, but with restrictions against lifting awkward objects, lifting more than 40 pounds, or overhead lifting. Mr. M. reached medical stability by September 29, 1997, but was left with a 9% permanent whole person impairment for the left shoulder injury. Sometime during late 1997, Mr. M. resumed work as a stagehand by obtaining referrals through the IATSE hiring hall.

On approximately January 26, 2001, Mr. M. provided IATSE with a physician's letter stating that Mr. M. continued to have some left shoulder deficiency with respect to lifting weights of more than 25 pounds away from his body, as well as any extended work above shoulder level. There followed a series of correspondence between IATSE and Mr. M.'S physician regarding the nature and significance of Mr. M.'S physical limitations. Ultimately, on March 6, 2001, the physician clarified that his earlier statement of Mr. M.'S limitations should not be viewed as necessary to prevent further injury, but was an explanation of Mr. M.'S physical capabilities.

In February 2001, during the same period of time that the foregoing exchange was taking place between IATSE and Mr. M.'S physician, Mr. M. advised a co-worker that he was not supposed to lift more than 30 pounds. The co-worker reported Mr. M.'S comment to IATSE, prompting IATSE to remove Mr. M. from its job referral list. On March 9, 2001, Mr. M. submitted a written request to IATSE for accommodation of his limitations. However, out of stated concerns for Mr. M.'S safety and the safety of his co-workers, IATSE ultimately declined to refer Mr. M. out on any additional stagehand jobs.

DISCUSSION AND CONCLUSION OF LAW

Among its other provisions, the Utah Antidiscrimination Act prohibits employment discrimination because of disability. Mr. M. contends his left-shoulder injury constitutes a disability within the meaning of the Act and that IATSE discriminated against him because of that disability. Mr. M. also contends that IATSE retaliated against him when he sought accommodation for his disability. The Appeals Board will first consider whether Mr. M.'S injury meets the applicable definition of "disability," then will consider whether IATSE retaliated against Mr. M..

Mr. M.'S left-shoulder impairment as a "disability." As noted above, the Utah Antidiscrimination Act protects persons with a "disability" from employment-related discrimination. However, §34A-5-102(5) of the Act does not independently define "disability" but, instead, adopts the definition used by the federal Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. 12102. There, a "disability" is defined as: (A) a physical or mental impairment that substantially limits one or more of an individual's major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment. Thus, to establish a disability for purposes of the Utah Antidiscrimination Act, Mr. M. must satisfy at least one prong of the foregoing definition. Because the definition is derived from federal law, it is appropriate to consider federal appellate decisions interpreting and applying the definition. Viktron/Lika v. Labor Commission, 38 P.3d 993, 995 (Utah App. 2001); Sheikh v. Department of Public Safety, 904 P.2d 1103 (Utah App. 1995); University of Utah v. Industrial Commission, 736 P.2d 630 (Utah 1987).

Mr. M. argues that his left-shoulder impairment substantially limits him in the major life activities of lifting, working and performing manual tasks, thereby satisfying the first prong of the

definition of disability. While it is undisputed that Mr. M.'S left shoulder is impaired, Mr. M. must also prove the impairment is substantially limiting in terms of his own experience. See Toyota v. Williams, 122 S. Ct. 681, 691 (2002).

In this case, Mr. M. has failed to establish[1] that the lifting restrictions resulting from his left-shoulder injury prevent or significantly restrict him from doing activities that are important in daily life, or from working in a broad class of jobs.[2] The Appeals Board therefore concludes that the impairment does not satisfy the first prong of the ADA's definition of disability.

The same conclusion applies to Mr. M.'S argument that he has "a record of such impairment" and, therefore, meets the second prong of the definition of "disability." As the 10th Circuit Court of Appeals noted in Lusk v. Ryder Integrated Logistics, 238 F.3d 1237 (10th Circuit 2001), "the impairment indicated in the record must be one that substantially limits a major life activity." While Mr. M. may have a record of left-shoulder impairment, that impairment is not a substantial limitation to any major life activity. The Appeals Board therefore concludes that Mr. M.'S circumstances do not satisfy the second prong of the disability definition.

Finally, Mr. M. contends he is "regarded" as having a substantially limiting impairment and therefore meets the third prong of the disability definition. There are two ways to qualify for protection under this provision. "(1) [A] covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities." Sutton v. United Air Lines, 527 U.S. 471, 489 (1999). But it is not unlawful for an employer to decide "that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job." *Id.* at 490-91.

As previously noted, Mr. M.'S impairment was not, in fact, substantially limiting. The evidence presented also failed to establish that IATSE mistakenly believed otherwise. To the contrary, IATSE appears to have viewed Mr. M. as impaired in his ability to lift, but only to the extent indicated by his physician. Communications among Mr. M., his physician and IATSE were an attempt to clarify whether Mr. M. could perform certain stagehand activities. The fact that IATSE recognized Mr. M.'S left shoulder problems does not establish that IATSE regarded Mr. M. as substantially limited in his major life activities.

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1 As part of his motion for review, Mr. M. submitted information from the Bureau of Labor Statistics regarding physical limitations in lifting and carrying in the workforce as a whole. Mr. M. also submitted information regarding the number of "general laborers" in the workforce. However, because this evidence was not submitted during the evidentiary hearing and was not subject to cross examination and rebuttal, the Appeals Board declines to consider it now. But even if this evidence were considered, such generalized information is inadequate to discharge Mr. M.'S burden of proof.

2 See also Rakity v. Dillon Companies, 302 F.3d 1152 (10th Circuit 2002), in which the Court surveys previous decisions in which impairments similar to those of Mr. M. were found not to establish a substantial limitation.

In summary, the Appeals Board concludes Mr. M. has not met any of the three prongs of the applicable definition of "disability." Consequently, he does not fall within the category protected by the Act against disability discrimination.

Retaliation. Mr. M. also alleges that IATSE retaliated against him for seeking accommodation of his left shoulder injury by refusing to refer him to work. Section 34A-5-102(17) of the Act defines unlawful retaliation as "the taking of adverse action by an . . . employment agency . . . against one of its . . . applicants . . . because the . . . applicant . . . has opposed any employment practice prohibited under this chapter. . . ." In the context of this case, Mr. M. must establish that 1) he engaged in protected opposition to discrimination or participation in a proceeding arising out of discrimination; 2) an adverse action was taken by IATSE subsequent to the protected activity; and 3) that there is a causal connection between Mr. M.'S protected activity and IATSE's adverse action. See Viktron/Lika v. Commission, 38 P.3d at 995

Assuming for purposes of discussion that Mr. M. has satisfied the first and second requirements listed above, the Appeals Board concludes that he has not satisfied the third element, which requires "a causal connection" between Mr. M.'S protected activity and IATSE' refusal to refer him for additional work. The evidence establishes that IATSE stopped referring Mr. M. for work as a stagehand out of concern that Mr. M. could not perform some of the heavy and awkward lifting that was required by the position. While the timing of IATSE' decision to stop referring Mr. M. for work is suspect, the inference of a causal connection between Mr. M.'S protected conduct and IATSE' action is dispelled by the contemporary correspondence and the parties' testimony. In summary, the Appeals Board finds no persuasive evidence that IATSE stopped referring Mr. M. for employment because Mr. M. had engaged in protected opposition to unlawful discrimination.

ORDER

The Appeals Board affirms Judge Eblen's decision and denies Mr. M.'S motion for review. It is so ordered.

Dated this 26th day of October, 2004.

Colleen S. Colton, Chair
Patricia Drawe
Joseph Hatch